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In the

# Supreme Court of the United States

OCTOBER TERM, 1930

NO. 422

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W. W. CUSTER, Petitioner,

vs.

ROB. B. McCUTCHEON, Substituted for F. M. Breshears, Deceased, United States Marshal for the District of Idaho,

Respondent.

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## PETITION FOR WRIT OF CERTIORARI

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## PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of W. W. Custer respectfully shows to this Honorable Court:

—A—

## SUMMARY STATEMENT OF THE MATTER INVOLVED

On March 7, 1921, judgment was entered in the District Court of the United States for the District of Idaho, Southern Division, in favor of the United States and against W. W. Custer, petitioner herein, and others, for the sum of $2086.87. On September 21st, 1929, eight years six months and fourteen days after judgment, execution was issued and delivered to F. M. Breshears, United States Marshal for the District of Idaho, directing that the judgment, with interest, which then amounted to approximately $3500., be satisfied by levy upon the property of petitioner and others, defendants in the action. The Marshal levied upon petitioner's bank account on October 9, 1929, by on that day serving a garnishment on the Lincoln County National Bank of Shoshone, Idaho, notifying said bank that all moneys, goods and credits of petitioner Custer were attached pursuant to the mandate of the aforesaid execution and the Marshal thereafter took the sum of $3500., into his possession from the petitioner's bank account.

Petitioner, W. W. Custer, instituted this suit in the United States District Court for the District of Idaho, Southern Division on October 10, 1929, to enjoin the Marshal, F. M. Breshears, from withdrawing the moneys of petitioner from the bank and from applying or using said moneys in payment or satisfaction of the judgment and for a decree adjudging said execution to be in all respects void and unenforcible, for the reason that under the laws of the United States and of the State of Idaho, and the rules of the United States District Court for the District of Idaho, the time had expired within which an execution could be legally issued, or a judgment enforced by means of execution (R.pp.7-11). A temporary restraining order was issued restraining the Marshal, F. M. Breshears, from disbursing or transferring the moneys taken into his possession under and by virtue of the execution in satisfaction of the judgment in favor of the United States, and the Marshal was also ordered to retain custody of said moneys until the further order of the court (R. pp. 11-15). Respondent Breshears moved to dismiss the complaint of petitioner upon the ground that said complaint does not state facts sufficient in equity to entitle plaintiff to name relief (R. p. 16). Respondent's motion was sustained. Memorandum opinion filed November 5, 1929, and order of dismissal entered November 6, 1929 (R. pp. 17-21). The

cause was disposed of as a matter of law by the District Court (R. pp. 21-22).

Two questions were considered by the District Court: First, Can petitioner maintain a separate action to enjoin the enforcement of a judgment? The court held that the action could be maintained (R. p. 18). Second, Conceding that judgments of the United States District Court in common law actions shall be enforced in the same manner as such judgments are enforced in state courts, under provisions of Section 916, United States Revised Statutes (28 U. S. C. A., Sec. 727) (Comp. Stat. Sec. 1510), and rule 73 of the United States District Court for the District of Idaho, is Section 6910, Idaho Compiled Statutes 1919, which provides that "the party in whose favor judgment is given may at any time within five years after the entry thereof have a writ of execution issued for its enforcement," a statute of limitations, and if so, may it be invoked against the United States? The court decided that the Idaho Statute was one of limitations and that it could not be invoked against the United States, notwithstanding Rule 73 of the Court, or Section 916, United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1510) (R. pp. 18-20).

On appeal the United States Circuit Court of Appeals for the Ninth Circuit affirmed the judg-

ment of the District Court. Opinion filed and decree entered June 9, 1930 (R. pp. 39-45).

Rob B. McCutcheon, United States Marshal for the District of Idaho, was substituted for F. M. Breshears, deceased, pursuant to motion and stipulation of counsel (R. pp. 37-39).

The United States Circuit Court of Appeals held in its opinion that although it be conceded that under Section 916, United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1510) and Rule 73 of the United States District Court for the District of Idaho, and Section 6910 Idaho Compiled Statutes 1919, in the case of a judgment in favor of a private person execution cannot lawfully issue after the lapse of five years from the entry of judgment, the same rule does not apply to the United States. This decision is reached by the Court holding that in the enactment of Section 916 United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1510), Congress did not give its express or implied consent that the United States should be bound by a statute of limitations, also that Section 6910, Idaho Compiled statutes 1919, is a statute of limitations restricting a common law right which was in existence at the time of its enactment and further that by accepting the provisions of the state law of Idaho as to similar remedies upon a judgment in any common law case by execution or other-

wise under the provisions of Section 916, United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1510), litigants in the United States District Courts were accorded no new rights in addition to those in existence at common law and, consequently, do not accept those rights subject to the limitations of time as stated in the state statutes (R. pp 42-44).

—B—

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) In deciding that an execution may lawfully issue in favor of the United States after the lapse of five years from the entry of a judgment in a United States District Court in Idaho, and that petitioner's moneys in a bank in Idaho may be taken by the United States Marshal under and by virtue of an execution issued over eight years after the entry of judgment, the United States Circuit Court of Appeals of the Ninth Circuit rendered a decision in conflict with the decision of the United States Circuit Court of Appeals of the Second Circuit, as announced in the case of United States v. Harpootlin, et al., 24 Fed. (2nd) 646.

(2) In holding that Section 6910, Idaho Compiled Statutes 1919, is a statute of limitations

restricting a common law right and that the United States as a litigant in the United States District Court for Idaho may proceed under the state law by execution pursuant to Section 916, United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1510) and Rule 73 of the United States District Court for the District of Idaho, and still not be bound by the provisions of the state law as to the time within which excution may lawfully issue, the United States Circuit Court of Appeals for the Ninth Circuit, has decided an important question of general law is an untenable way and in conflict with the weight of authority.

(3) In deciding that Congress did not give its consent, either express or implied, that the United States should be bound by the state statutes of limitations in enforcing a judgment in any common law action in any District Court by execution pursuant to the provision of Section 916, United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1510) and Rule 73 of the United States District Court for the District of Idaho, the United States Circuit Court of Appeals for the Ninth Circuit, has decided an important question of general law in an untenable way and in conflict with the weight of authority.

(4) In holding that in the enactment of Section 916, United States Revised Statutes (28 U. S.

C. A. Sec. 727) (C. S. Sec. 1510), Congress did not consent impliedly or expressly that the United States should be bound by state statutes of limitations in enforcing a judgment in any common law action in any District Court by execution, the United States Circuit Court of Appeals for the Ninth Circuit has decided an important question of Federal law which has not been, but should be, settled by the United States Supreme Court.

(5) In holding as follows: that in the enactment of Section 916, United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1510), Congress did not give its consent, express or implied, that the United States should be bound by a state statute of limitations; that Section 6910, Idaho Compiled Statutes 1919, is a statute of limitations; that by accepting the provisions of the state law of Idaho as to similar remedies upon a judgment in any common law cause by execution or otherwise under the provisions of Section 916, United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1510, litigants in the United States District Courts were accorded no new rights in addition to those in existence at common law and, consequently, do not accept those rights subject to the limitations of time as stated in the state statutes; and that an execution may lawfully issue in favor of the United States after the lapse of five years from the entry of a judgment

in a United States District Court in Idaho, and that petitioner's moneys in a bank in Idaho may be taken by the United States Marshal under and by virtue of an execution issued over eight years after entry of judgment, the United States Circuit Court of Appeals for the Ninth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of, and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 6079, W. W. Custer, Appellant, vs. Rob B. McCutcheon, substituted for F. M. Breshears, deceased, United States Marshal for the District of Idaho, appellee, and that said judgment of the United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as

to this Honorable Court may seem meet and just; and your petitioner will ever pray.

W. W. CUSTER

JAMES R. BOTHWELL,
*Counsel for Petitioner.*

W. ORR CHAPMAN,
*Of Counsel.*



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## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

---

JAMES R. BOTHWELL,
*Counsel for Petitioner.*

W. ORR CHAPMAN,
*Of Counsel.*
*of Twin Falls, Idaho.*

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## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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## I

## THE OPINIONS OF THE COURTS BELOW

The case in the United States District Court is entitled, "W. W. Custer, Plaintiff, vs. F. M. Breshears, United States Marshal for the District of Idaho, Defendant." The opinion and judgment of the District Court were filed November 6, 1929, and appear in the record at pages 17 to 21. The case in the United States Circuit Court of Appeals is entitled, "W. W. Custer, Appellant, v. Rob B. McCutcheon, substituted for F. M. Breshears, Deceased, United States Marshal for the District of Idaho, Appellee," and the opinion and decree of the United States Circuit Court of Appeals will be found on pages 40 to 45, inclusive, of the record.

## II

## JURISDICTION

The Supreme Court has jurisdiction to require by Certiorari that this cause be certified for determination by it with the same power and authority, and with like effect as if the cause had been brought before the court by unrestricted appeal.

United States Judicial Code, Sec. 240, as amended by the act of February 13, 1925. 43 Statutes 938.

Decree of the United States Circuit Court of Appeals was filed and entered on June 9, 1930 (R. p. 45).

By its decree the United States Circuit Court of Appeals for the Ninth Circuit has decided that the United States may satisfy a judgment by execution issued more than eight years after entry of the judgment (R. p. 44).

This decision is in conflict with the holding in the case of the United States v. Harpootlian, et al., 24 Fed (2d), 646, decided by the United States Circuit Court of Appeals of the Second Circuit, and should entitle the petitioner to a Writ of Certiorari.

Keller et al v. Adams-Campbell Co., Inc., et al., 264 U. S., 314, 68 L. Ed. 705, 44 Sup. Ct., 356.

Magnum Import Co. v. Coty, 262 U. S. 159, 67 L. Ed. 922, 43 Sup. Ct. 531.

The court holds tat the provisions of Section 6910, Idaho Compiled Statutes 1919, operate as a restriction upon common law right and not as a grant of a new right. (R. pp. 42-43). The holding disposes of an important question of general law in an untenable way and in conflict with the weight of authority.

Fink v. O'Neil, 106 U. S. 272, 27 L. Ed. 196, 1 Sup. Ct. 325.

In re Van Tassell's Will, 196 N. Y. S., 491

Culp v. Butler (Ind.), 122 N. E. 684.

Partee v. St. Louis & S. F. R. Co., 204 Fed., 970.

United States ex rel Texas P. Cement Co., v. McCord, 233 U. S., 157, 58 L. Ed. 893.
United States v. Harpootlian et al., 24 Fed. (2d) 646.
23 C. J., Sec. 138, p. 375.

The court also holds that Congress did not consent that the United States shall be bound by a state statute of limitations in enforcing a judgment in a common law action by execution. (R. pp. 43-44). By so holding the court decided an important question of general law in an untenable way and in conflict with the weight of authority and also decided an important question of Federal law which has not been, but should be, settled by the United States Supreme Court.

Fink v. O'Neil, 106 U. S., 272, 27 L. Ed. 196, 1 Sup. Ct., 325.
Green v. United States, 9 Wall. 655, 76 U. S. S. 658, 19 L. Ed. 806.
Allen v. Clark, 126 Fed., 738, 740, 62 C. C. A., 58, affirming 114 Fed. 374.
Payette v. Marshall Co., 108 Ia., 660, 163 N. W., 592.
Thompson v. Avery, 11 Ut. 214, 39 Pac. 829.
United States v. Harpootlian, et al., 24 Fed. (2d) 646.

In its decision the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

## III

## STATEMENT OF THE CASE

A full statement of the case has been given under the heading "A" in the petition and in the interest of brevity the statement will not be repeated at this point.

## IV

## SPECIFICATION OF ERRORS

### I

The United States Circuit Court of Appeals erred in finding and holding that respondent, United States Marshal for the District of Idaho, was entitled to levy upon petitioner's bank account under and by virtue of an execution issued more than eight years after the entry of judgment; and further, that petitioner's bank account could be applied in satisfaction of said judgment under and by virtue of said execution after the lapse of five years, which is the time provided by the statutes of the state of Idaho within which an execution may be issued upon judgments within said state.

### II

The United States Circuit Court of Appeals erred in finding and holding that Section 6910, Idaho Compiled Statutes 1919, is a statute of limitation restricting a common law right and that the United States as a litigant in the United States District Court for Idaho, may proceed under the state law by execution pursuant to Section 916

U. S. Rev. Stat. (28 U. S. C. A. Sec. 727) (C. S. Sec. 1540), and Rule 73 of the United States District court for the District of Idaho, and still not be bound by the provisions of the state law as to the time within which execution may lawfully issue.

III

The United States Circuit Court of Appeals erred in finding and holding that Congress did not give its consent that the United States should be bound by the state statutes of limitations in enforcing a judgment in any common law action in any District Court by execution pursuant to the provisions of Sec. 916, U. S. Rev. Stat. (28 U. S. C. A. Sec. 727) (C. S. Sec. 1540), and Rule 73 of the United States District Court for the District of Idaho.

IV

The United States Circuit Court of Appeals erred in finding and holding that the judgment of the United States District Court should be affirmed in dismissing plaintiff's complaint and granting judgment for costs against plaintiff and in favor of defendant for the reasons set forth in Specification of Errors, I, II and III.

## V

## ARGUMENT

### SUMMARY OF ARGUMENT

(POINT "A")

The decision of the United States Circuit Court of Appeals is contrary to and in conflict with the decision of the United States Circuit Court of Appeals of the Second Circuit, rendered in the case of United States v. Harpootlian, et al., 24 Fed., (2d) 646, on October 13, 1928.

After quoting Section 916 of the United States Revised Statutes (28 U. S. C. A. Sec. 727) Rule 73 of the United States District Court of Idaho, and Section 6910, Idaho Compiled Statutes, 1919, as authority for the procedure followed in the present case, the Circuit Court decides that the United States may proceed to satisfy the judgment obtained in its favor by execution after the lapse of five years, notwithstanding the provisions of the statute of Idaho.

The court likewise in the case of United States v. Harpootlian, et al., supra, quotes Section 916 United States Revised Statutes (U. S. C. A. Sec. 727), a similar rule of the District Court of the United States for the Southern Division of New York and similar Practice Acts of the state of New York, and then announces its decision that the statutes of New York are binding against the United States as a sovereign power, notwithstanding the well recognized rule that the United States as a sovereign power is not bound by any statute

of limitations unless Congress manifests its intention otherwise. The decisions are directly in conflict.

(POINT "B")

In holding that the provisions of Section 6910, Idaho Compiled Statutes 1919, operate as a restriction upon a common law right and not as a grant of a new right, the court disposes of an important question of general law in an untenable way and in conflict with the weight of authority.

Fink v. O'Neil, 106 U. S. 272, 27 L. Ed. 196, 1 Sup. Ct. 325.
In re Van Tassell's Will, 196 N. Y. S. 491.
Culp v. Butler (Ind.), 122 N. E. 684.
Partee v. St. Louis & S. F. R. Co., 204 Fed. 970.
United States ex rel Texas P. Cement Co., v. McCord, 233 U. S. 157, 58 L. Ed. 893.
United States v. Harpootlian et al., 24 Fed. (2d) 646.
23 C. J. Sec. 138, p. 375.

Courts of the United States have no inherent powers to proceed by execution under the common law. Hence the adoption of Section 6910, Idaho Compiled Statutes 1919, by the United States by appropriate legislative enactment did not limit or restrict a common law right of the United States.
Fink v. O'Neil (Supra).

(POINT "C")

The United States Circuit Court of Appeals has decided an important question of general law in an untenable way and in conflict with the weight

of authority and has also decided an important question of federal law which has not been, but should be, settled by the United States Supreme Court, when it held that Congress did not consent that the United States shall be bound by a state statute of limitations in enforcing a judgment in a common law action by execution.

Fink v. O'Neil, 106 U. S. 272, 27 L. Ed. 196, 1 Sup. Ct. 325.

Green v. United States, 9 Wall. 655. 19 L. Ed. 806.

Allen v. Clark, 126 Fed. 738, 740 62 C. C. A. 58, affirming 114 Fed. 374.

Payette v. Marshall County, 108 Ia. 660 163 N. W. 592.

Thompson v. Avery, 11 Ut. 214, 39 Pac. 829.

United States v. Harpootlian, et al., 24 Fed. (2d) 646.

It must be held that the United States has adopted the laws of Idaho as to the enforcement of a judgment, otherwise it is without any means of realizing upon a judgment.

(POINT "D")

In its decision the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Cases Cited (Supra).

## (POINT "A")

## CONFLICT WITH PRIOR FEDERAL DECISIONS

Section 916, of the United States Revised Statutes, (28 U. S. C. A. Sec. 727) (C. S. Sec. 1540), provides that:

> "The party recovering a judgment in any common law cause in any District Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are provided in like causes by the laws of the state in which such court is held, or by any such laws which may be subsequently enacted and adopted by general rules of such district court; and such courts may, from time to time, by general rules, adopt such state laws as may be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

Standing Rule 73 of the United States District Court of Idaho is as follows:

> "Subject to the provisions of the Acts of Congress in relation to executions, judgments in actions at law shall be enforced in the same manner as such judgments in the state courts are enforced and the state laws in relation to executions, sales, exemptions, rights of purchasers, rights of judgment creditors and judgment debtors, redemptions, liens of judgments and all decrees and proceedings supplementary to execution, as said provisions now exists or as they shall exist at the time in question, are adopted as rules of this court; and the Mar-

shal of this court shall conform his proceedings thereto; * * *"

And by Section 6910 of the Idaho Compiled Statutes 1919, it is provided:

> "The party in whose favor judgment is given, may at any time within five years after the entry thereof, have a writ of execution issued for its enforcement."

The United States Circuit Court quotes the above statutes and rule of the United States District Court for the District of Idaho, as being applicable under the facts in the instant case and then reaches the conclusion that the United States may proceed to satisfy the judgment in question by an execution issued after a lapse of five years contrary to the language of Section 6910, Idaho Compiled Statutes 1919, although it is conceded by the Government that in the case of a judgment in favor of a private person execution thereon cannot lawfully issue after the lapse of five years from the entry of judgment.

In the United States v. Harpootlian, et al., 24 Fed. (2d) 646, the facts as stated in the opinion are as follows:

> "That on March 29, 1927, an order was entered by the District Court of the United States for the Southern District of New York, directing the defendant in error, Harpootlian, to appear for examination supplementary to execution on April 19, 1927. The order appealed from vacates that order. Judgment was obtained against the defendant in error in favor of the United States on September 13, 1913. An execution thereon was issued on October

6, 1913, and returned unsatisfied. A second execution was issued September 21, 1926, and was returned unsatisfied. The provision for such examination is found in Section 916 of the United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1540), reading: 'Statute quoted * * *.'"

The court says:

"The rule of the District Court for the Southern District of New York, in effect November 1st, 1926, provides that in common law causes the party shall be entitled to the same rights and remedies respecting attachments against the property and proceedings supplementary to execution as are or may be provided by the laws of the state of New York and it adopts such laws. Sec. 779 of the Civil Practice Act of the state of New York permits an examination of a debtor after the return of an execution at any time within ten years and enumerates the contents of an affidavit which must support the order requiring the debtor under the judgment to attend and be examined concerning his property."

The court then refers to the fact that Section 967 of the United States Revised Statutes (28 U. S. C. A. Sec. 814) (C. S. Sec. 1608), provides that judgments and decrees of the District Court, shall cease to be liens on real estate or chattels real in the same manner and at like periods as judgments and decrees of the courts of such state fix, by law, to the liens thereon."

And that Section 510 of the Civil Practice Act of New York provides that a lien or judgment upon real estate of the debtor which is docketed

in the county clerk's office in a charge for ten years after filing the judgment roll upon the real estate and chattels real in that county—.

And that Section 812 of Title 28 of the United States Code (28 U. S. C. A. Sec. 812) (C. S. Sec. 1606), provides that judgments and decrees of the "District Court of the United States * * * shall be liens on property throughout such state in the same manner and to the same extent, and under the same conditions only, as if such judgments and decrees had been rendered by the court of general jurisdiction of such state." The court also states it is provided that "whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or anything to be done in a particular manner" so that "a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States Courts to be registered, recorded, docketed, indexed, or otherwise conform to the rules and requirements relating to the judgments and decrees of the courts" of the United States. 25 Statutes, Sec. 357.

The court holds:

> "That it was necessary for the government to issue and have returned unsatisfied, an execution against the property of the defendant in error, real and personal, before an order to examine in supplementary proceedings could be granted."

And further states:

> "That by Section 652 of the Civil Practice

> Act of New York, it is provided that after a lapse of five years from the entry of final judgment execution can be issued thereon only where an execution was issued thereon within five years after the entry of the judgment and has been returned wholly unsatisfied or unexecuted."

Also:

> "The order vacated here for the examination was entered over ten years after the return of the excution unsatisfied. The executions were issued on the judgments of October 6, 1913, and September 21, 1926, respectively."

The court then proceeds to consider the effect of a judgment of the United States court as a lien on real estate, coextensive with the territorial jurisdiction of the District Court for the district in which the defendant lives and holds that judgments of the District Court have the same effect, and no more, in their operation as liens upon the property of judgment debtors as the law of the state in which they are rendered prescribed for judgments of the state courts.

The court further says: "but it is argued by the plaintiff in error that Section 779 of the Civil Practice Act of New York has reference to the first execution, and that the ten year period providing for examniation in supplementary proceedings is a limitation which is not binding against the United states as a sovereign power under the familiar rule that a statute of limitations may not be invoked against the United States. We fully recognize the principal of public policy applicable to all governments alike, which forbids that the

public interest should be prejudiced by the negligence of officers and agents, to whose care they are confided, and that the United States, as a sovereign power, is not bound by any statute of limitations unless Congress manifests its intention otherwise. United States v. Thompson, 98 U. S., 486, 25 L. Ed. 194. United States v. Nashville Ry., 118 U. S., 120, 6 Sup. Ct., 1006, 30 L. Ed., 81, Standley v. Schwalby, 114 U. S. 508, 13 Sup. Ct., 418, 37 L. Ed., 259. But judgments of the United States have the same effect and no more, in their operation as the lien upon the property of judgment debtors as the law of the state in which they are rendered prescribes for judgments of the state courts."

In United States v. Minor, 235 Fed. 101, (C. C. A. 4th Circuit and United States v. Kendall (D. C. La.,), 263 Fed., 126, it was held "that an action to enforce the lien and judgments in favor of the United States created by virtue of the state statutes making such judgments liens, if duly docketed against real estate for ten years could be maintained after the ten year period and this, because it is said to be a statute of limitations which may not be invoked against the United States."

The court continues and considers the effect of a judgment as a lien on real estate at common law and holds that any lien by judgment is created by statute and not by common law.

And further says, speaking of Section 510, Civil Practice Act of New York, which provides that a lien of judgment upon real estate of the debtor which is docketed in the county clerk's office is

a charge for ten years after filing the judgment roll upon the real estate and chattels read——" the provision of the Civil Practice Act of the State of New York, which creates the lien, provides in express terms the period of its existence. It is not a statute of limitations upon a right of action which may be of no avail against a sovereign."

Also, speaking of Section 652 of the Civil Practice Act of New York, which provides that after a lapse of five years from the entry of final judgment execution can be issued thereon only where an execution was issued thereon within five years after the entry of judgment and has been returned wholly unsatisfied or unexecuted, the court says: "The provisions of Civil Practice Act fixes a period of time within which a party having a judgment may follow the defendant's real estate into the hands of grantees or his personal property by execution. Failing to avail himself of such privilege within the time fixed, the right expires, and he must enforce his judgment, if at all, by some other method of levy and sale upon such property as he can find belonging to the judgment debtor, unaided by statutory lien."

Also, "The State statute makes no provision for extension of time in the case of a judgment obtained by the United States, nor can the officers of the government prolong it by neglecting to make use of its benefits. Payette v. Marshall Co., 180 Ia., 660, 163 N. W., 592. Thompson v. Avery, 11 Ut. 214, 39 Pac., 829.

Congress has provided only by the statutes above referred to that the right of execution and exam-

ination of debtor shall be coextensive and consistent with that granted by the state within the territory of the district where the statutory period has run, the right expires completely by the mere lapse of time the lien is ended. The doctrine of governmental immunity in the statute of limitations does not apply and when the time of lien lasped within the terms of its grant the government is in the same position as a private litigant.

In Fink v. O'Neil, 106 U. S., 272, 1 Sup. Ct., 125, 27 L. Ed. 196, "a perpetual injunction was granted to restrain the United States Marshal from proceeding upon a judgment rendered in favor of the United States in the District Court to levy on real estate, exempt under state law from sale under execution. In affirming the decree the court said: "Nothing can be more clear than this, as a recognition by Congress, that in case of executions upon the judgments in civil actions, the United States are subject to the same exemptions as apply to private persons by the law of the state in which the property levied on it found." After ten years have elapsed the lien of the plaintiff in error's judgment on real property of the defendant in error was at an end and the proceeding to examine in supplementary proceedings could not be maintained upon the basis of a continuation of the lien, because of the rule that the statute of limitations does not run against the United States."

The court in the case of United States v. Harpootlian, supra, considered two questions:

1. Execution having been issued and returned un-

satisfied pursuant to the provisions of Section 652 of the Civil Practice Act of New York, may on order be entered directing the defendant in error to appear for examination supplementary to execution after a lapse of more than ten years contrary to the provisions of Section 779, Civil Practice Act of the state of New York, which permits an examination of a debtor after the return of an execution at any time within ten years?

The court answered this question in the negative.

2. May the order be entered upon the grounds that plaintiff in error's judgment was a lien upon the real property of defendant in error after ten years had elapsed and that the order could be maintained upon the basis of a continuation of the lien?

The court answers this question in the negative, and referring to Section 510 of the Civil Practice Act of New York says: "It is not a statute of limitations upon a right of action which may be of no avail against a sovereign."

In considering both of these questions the court discusses the effect of Section 779 of the Civil Practice Act of the state of New York, which permits an examination of the debtor after the return of an execution at any time within ten years, and holds that the statute is binding against the United States as a sovereign power, notwithstanding the well recognized rule that the United States as a sovereign power is not bound by any statute of limitations unless Congress manifests its inten-

tion otherwise; and further, the court holds in referring to the statutes of New York that no provision for extension of time is recognized in the case of a judgment obtained by the United States, nor can the officers of the government prolong it by neglecting to make use of its benefits, and that Congress has provided only by the statutes referred to in the opinion that the right of execution and examination of a debtor shall be co-extensive and consistent with that granted by the state within the territory of the District Court, and where the statutory period has run the right expires completely by the mere lapse of time the lien is ended. The doctrine of governmental immunity in the statute of limitations does not apply and when the time of lien lapsed within the terms of its grant the government is in the same position as a private litigant.

Comparing the decision of the United States Circuit Court of Appeals for the Ninth Circuit in the instant case, with the holding of the Circuit of the Second Circuit, in the case of United States v. Harpootlian, et al, supra, we find that the Circuit Court fo rthe Ninth Circuit quotes Section 916 of the Revised Statutes (28 U. S. C. A. 727) standing Rule 73 of the United States District Court for the District of Idaho, and Section 6910, Idaho Compiled Statutes 1919, as being applicable under the facts and then holds, notwithstanding the provisions of Section 6910, Idaho Compiled Statutes 1919, that the United States may proceed to issue an execution more than eight years after the date of the entry of judgment and

levy upon petitioner's bank account and satisfy the judgment.

Why should there be a conflict between the Circuit Courts of the Ninth Circuit and the Second Circuit upon these questions? In its decision the Circuit Court for the Ninth Circuit says:

> "But the right of a judgment creditor to execution process does not have its origin in the state statute. It existed at common law. 3 Cooley's Blackstone, 431, Freeman on Execution, 3rd Ed., Sec. 27. The statute only enlarged the time during which the right may be exercises from one year to five years, and seemingly under the common law the limitation of time was not recognized as binding upon the state. Coombs v. Jordon, 3 Bland's Chancery (Md.), 284, 324; s. c. 22 Am. Dec. 236, 271. See also Nimmo's Executor v. Commonwealth, 4 Hen, and M. (Virginia Rep. Ann.) 57, While we have failed to find an any of the texts a discussion of this exception, it would appear to be highly illogical to hold that the state may, without regard to time, bring an action to recover on a claim but by lapse of time it is barred from enforcing its judgment thereon. After all, the ultimate purpose of an action is not to get a judgment but to recover the claim, and every consideration underlying the rule that the state should not be barred from bringing the suit with equal force supports the rule that it should not be barred from prosecuting the suit, once it is begun, to the complete accomplishment of the purpose thereof. If it is not to be prejudiced by the negligence of its officers and agents in bringing the action, neither should it be defeated by like negligence in respect to

taking out execution process upon the judgment. In the absence of some expression to the contrary it is, therefore, to be presumed the legislature intended only to enlarge the time of an established rule and not to widen its scope. While in its phraseology the statute suggests nothing more, under appellant's interpretation it would operate not to enlarge but to abridge a pre-existing right of one class of judgment creditors."

And has this to say of the cases cited in the brief, including United States v. Harpootlian et al., 24 Fed. .2d) 646:

"With the exception of the United States v. Noojin, 155 Fed., 377, 380, which seemingly supports the conclusion that we have reached, no decided case has come to our notice where the precise question has been considered. Of the other decisions cited in the briefs, those most nearly in point are Fink v. O'Neil, 106 U. S. 272, United States v. Minor, 235 Fed., 101, United States v. Kendell, 263 Fed., 126, and United States v. Harpootlian, 24 Fed. (2d) 646. In the Fink case was involved only by question whether as a creditor the government could ignore state exemption laws, and in the public policy underlying such statutes the court found cogent reasons for holding that Congress did not intend to except the United States from the operation thereof. In each of the other three cases the question at issue was whether or not a statute limiting the duration of a judgment lien was binding upon the government. In the Harpootlian case the question was answered in the affirmative, a conclusion apparently out of harmony with the view adopted in the other two. But, however that may be, admittedly there was no such

lien at common law and hence the liens in question were purely creatures of the statute. Not without reason, therefore, it could be held that the United States, as well as other creditors, must take such a lien with its statutory restrictions and limitations."

The United States Circuit Court of Appeals of the Ninth Circuit in the instant case holds that the right of a judgment creditor to execution process does not have its origin in the state statute. It existed at common law and that the statute only enlarged the time during which the right may be exercised from one year to five years, and seemingly under the common law the relation of time was not recognized as binding upon the state. And that while we have failed to find in any of the texts a discussion of this exception, it would appear to be highly illogical to hold that the state may, without regard to time, bring an action to recover upon a claim, but by lapse of time it is barred from enforcing its judgment thereon.

The court in the case of United States v. Harpootlian, supra, says:

"That the provision of the Civil Practive Act fixes a period of time within which a party having judgment may follow the defendant's real estate into the hands of grantees, or his personal property, by execution. Failing to avail himself of such privilege within the time fixed the right expires—; also Congress has provided only by the statutes above referred to that the right of execution and examination of debtors shall be co-extensive and consistent with that granted by the state within the territory of the District Court. Where the statu-

> ory period has run the right expires completely by the mere lapse of time the lien is ended. The dictrine of governmental immunity in the statute of limitations does not apply and when the time of lien lapsed within the terms of its grant, the government is in the same position as a private litigant."

The two decisions are in direct conflict. The weight of authority sustains the United States Circuit Court of Appeals of the Second Circuit. Also the courts are not in harmony as to the effect of the decision of the court in the case of Fink v. O'Neil, 106 U. S., 172, 1 Sup. Ct. 325, 27 L. Ed. 196. The Circuit Court of the Second Circuit cites this case as authority for the conclusion reached in its decision and quotes from that decision as follows:

> "Nothing can be more clear than this as a recognition by Congress that in case of executions upon judgments in civil actions the United States are subject to the same exemptions as apply to private persons by the law of the state in which the property levied on is found."

The Circuit Court for the Ninth Circuit in speaking of the case of Fink v. O'Neil, supra, says:

> "In the Fink case was involved only the question whether as a creditor the government could ignore state exemption laws and in the public policy underlying such statutes the court found cogent reasons for holding that Congress did not intend to except the United States from the operation thereof."

(POINT "B")

THE COURT HAS DECIDED AN IMPORTANT QUESTION OF GENERAL LAW IN AN UNTENABLE WAY AND IN CONFLICT WITH THE WEIGT OF AUTHORITY.

It will hardly be disputed that a decision of a court which lays down an unqualified rule as to the enforcement of judgments by execution disposes of an important question of general law. In other words, a judgment is the only effective means of realizing upon a claim and the enforcement of a judgment by process of the courts is the only way by which the rights of litigants may be settled in accordance with decisions of the courts. It involves a question of general law. To hold that a state statute which fixes the limitation within which an execution may be issued upon a judgment is a restriction upon a common law right, disposes of an important question of general law. The limitation upon a common law right at once becomes an important question of general law when applied as a restriction in the enforcement of a judgment.

In the case of Fink v. O'Neil, supra, the court says:

> "And if the laws in question do not permit an execution to issue upon a judgment in favor of the United States, except subject to the exemptions which apply to citizens, there are no others which confer authority to issue any execution at all. For, as was said by Mr. Justice Daniell, in Cary v. Curtis, 3 How, 236, 245, 'the courts of the United States are all limited in their nature and constitution and

have not the powers inherent in courts existing by prescription or by the common law.'"

A true statute of limitations alters the common law by introducing a limitation upon the common law right in mentioned cases and assigns a certain time reducing the common law period after which the right cannot be exercised or enforced.

In re Van Tassell's Will, 196 N. Y. S., 491,
Culp v. Butler (Ind.), 122 N. E., 684.

As opposed to statutes of limitation we have statutes of creation, which create a right and fix the time within which the right may be exercised.

Partee v. St Louis & S. F. R. Co., 204 Fed., 970.
United States ex rel Tex. P. Co. v. McCord, 233 U. S., 157. 58 L. Ed., 893.

The quotations from the decision of the United States v. Harpootlian, 24 Fed. (2d) 646, under Point "A" are applicable under this point as well.

(POINT "C")

CONGRESS CONSENTED THAT THE UNITED STATES SHALL BE BOUND BY STATE STATUTES AS TO LIMITATIONS IN ENFORCING JUDGMENTS IN A COMMON LAW ACTION BY EXECUTION; THE HOLDING OF THE COURT TO THE CONTRARY IS UNTENABLE AND IN CONFLICT WITH THE WEIGHT OF AUTHORITY AND DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE UNITED STATES SUPREME COURT.

The Court disposes of an important question of general law because it lays down a rule for the enforcement of all judgments in favor of the United States. It will be recognized that the numerous enterprises which now engage the attention of the attention of the United States make questions of enforcing judgments in favor of the United States important questions of general law. The court also directly holds that Section 916 of the United States Revised Statutes (28 U. S. C. A. Sec. 727,) (C. S. Sec. 1540), gives the United States the right to proceed by execution to satisfy a judgment after the lapse of five years contrary to the provisions of a statute of Idaho adopted by the United States by appropriate legislative enactment. The decision deals with a question of practice which controls the enforcement of all judgments in the United States District Courts and, therefore, becomes decisive of a very important question of Federal law and should, in the interest of clarity, and as a saving of expense and time to litigants, be settled by the United States Supreme Court.

The decision is clearly untenable and in conflict with the weight of authority.

In the case of Fink v. O'Neil, supra, the court says:

> "The question, therefore, is, whether the United States, by an appropriate legislative act, has adopted the lews of Wisconsin exempting homesteads from execution and, if at all, whether they apply in cases of execution upon judgments in favor of the United States."

The court then quotes Section 916, Revised Stat-

utes, and traces the history of the statute through various enactments to its present form, and then says:

> "It will be seen from this provision that it was thereafter prohibited to the courts of the United States either to adopt or recognize any form of execution, or give any effect to it, except such as was, at the time of the passage of the act, or had subsequently become at the time of their adoption, a writ authorized by the laws of the state. The same provision has ever since been continued in force and is now embodied in Section 916 of the Revised Statutes already quoted."

Also:

> "It is further to be observed that no distinction is made in any of the statutes on the subject between executions on judgments in favor of private parties and on those in favor of the United States. And as there is no provision as to the effect of executions at all, except as contained in this legislation, it follows necessarily that exemptions from levy and sale, under executions of one class, apply equally to all, including those on judgments recovered by the United States."

The court holds that the exemption of homesteads from levy and sale upon executions provided by the statute of Wisconsin became a law of the United States within that state and applies to executions issued upon judgments in several cases referred to in their courts in their own name and behalf, equally with those upon judgments rendered in favor of private parties, and the court uses this language:

"This conclusion cannot be avoided by the consideration which has been urged upon us, that the process acts do not limit the sovereign rights of the United States upon the principle that the sovereign is not bound by such laws unless he is expressly named. These laws are the expression of the sovereign will on the subject and are conclusive upon the judicial an dexecutive officers to whom they are addressed; and as they forbid the issue of an execution in every case, except subject to the limitations which they mention, and as there is no authority to issue an execution in any case whatever, except as conferred by them, the sovereign right invoked is left without the means of vindication. The United States cannot enforce the collection of a debt from an unwilling debtor except by judicial process. They must bring a suit and obtain a judgment. To reap the fruit of that judgment they must cause an execution to issue. The courts have no inherent authority to take any one of these steps except as it may have been conferred by the legislative department; for they can exercise no jurisdiction except as the law confers and limits it."

Aud further:

"This objection is also met expressly by the decision of this court in the case of United States v. Knight, 14 Pet. 301. * * * And the court later in the opinion says: 'If a contrary construction to the process acts should be given on the ground that they do not include the United States, which, although a litigant, continues, nevertheless, to exercise the prerogatives of a sovereign, would follow that they might resort to any writ known to the common law, however, antequated or obso-

lete, and in defiance of the progress of enlightened legislation on that subject, revive all the hardships of imprisonment for debt, even without the liberty of statutory jail limits."

And the court holds:

"That in case of executions upon judgments in civil actions, the United States are subject to the same exemptions as applied to private persons by the law of the state in which the property levied on is found."

The holding of the Circuit Court of Appeals of the Ninth Circuit in the case at bar is opposed to the rules as announced by the United States in the case of Fink v. O'Neil, supra, and consequently is in conflict with the weight of authority and untenable.

(POINT "D").

THE DECISION CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The decision of the court deals particularly with a rule of proceduce, viz: the enforcement of a judgment. The accepted and usual course of judicial proceedings as to the enforcement of judgments, is governed by the Act of Congress, Section 916 of the United States Revised Statutes (28 U S C A 727), and a construction of this statute should be clear and unambiguous and in harmony with the weight of authority. When a Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings measured by this standard, it should call for an exercise of this court's power of supervision.

## CONCLUSION

It is, therefore, respectfully submitted, that this case is one calling for the exercise by this court of its supervisory powers in order that the conflict between the holding in the case at bar and the decision in the case of United States v. Harpootlian, et al., 2 4Fed. (2d) 646, may be reconciled, and that the important questions of general law which have been disposed of in the instant case in an untenable way and in conflict with the weight of authority, may be corrected, and that the decision which has been rendered upon an important question of Federal law may be settled by the United States Supreme Court, and that to such an end a writ of certiorari should be granted, and this court should review the decision of the United States Circuit Court of Appeals for the Ninth Circuit and finally reverse it.

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